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Re Hashbudin bin Hashim; Ex parte Citic Ka Wah Bank Ltd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D8–29–2038 OF 1998
KANG HWEE GEE J
5 FEBRUARY 2009

Bankruptcy — Capacity of bankrupt — Undischarged bankrupt — Whether bankrupt competent to negotiate settlement of debt with creditor — Creditor agreeing to reduce amount in proof of debt — Whether agreement valid

Bankruptcy — Director General of Insolvency — Sanction — Reduction of amount of proof of debt — Agreement between bankrupt and creditor to reduce debt owing — Whether Director General of Insolvency could approve reduction of amount stated in proof of debt — Bankruptcy Act 1967 s 42 Schedule C r 27

Originally the Director General of Insolvency ('DGI') had approved a large sum of RM41,448,354.72 as a debt due and owing to the judgment creditor arising from a banking facility granted to a company of which the judgment debtor had stood as guarantor. The DGI then applied under s 42 Schedule C r 27 of the Bankruptcy Act 1967 ('the Act') to the senior assistant registrar ('SAR') to reduce the amount proved from RM41,448,354.72 to RM260,000. The DGI in making the application had relied on two letters written by the solicitor of the judgment creditor which clearly indicated that they were prepared to accept the proof of debt of RM260,000 in lieu of the sum of RM41,448,354.72. At the time of proof of debt for the sum of RM41,448,354.72 by the DGI was issued, the DGI had no evidence to show that a different sum had been agreed between the judgment creditor and the judgment debtor. The judgment creditor filed the present appeal against the decision of the SAR in allowing the DGI's application to reduce the amount in the proof of debt. The issues arising were: (i) whether a bankrupt can act on his own to negotiate with his creditors given that a bankrupt has no legal status; and (ii) whether the correspondences between the judgment debtor and the judgment creditor constitute a concluded contract which bound the parties to reduce the initial debt of RM41,448,354.72 to a mere RM260,000.

Held, dismissing the appeal with costs:

(1) A bankrupt is competent to negotiate any settlement of his debt with

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his creditor and provided that any agreement that is reached pursuant to that negotiation is brought to the attention of the DGI for his approval, such an agreement is perfectly valid (see para 10).

(2) It was perfectly within the right of the DGI acting under s 42 Schedule C r 27 of the Act to apply to the court to reduce the amount in the proof of debt which he had approved earlier. What the DGI was now applying for was 'to expunge or reduce' the amount that he had previously admitted if the DGI thought that a proof had been improperly admitted (see paras 11–12).

(3) The letter dated 29 July 2004 from the solicitors for the judgment creditor to the judgment debtor clearly indicated that the judgment creditor was prepared to accept the reduced debt. The letter constituted a perfectly concluded agreement between the judgment creditor and the bankrupt subject only to the approval of the DGI (see paras 14–15).

[Bahasa Malaysia summary

Pada mulanya Ketua Pengarah Jabatan Insolvensi ('KPJI') telah meluluskan sejumlah besar RM41,448,354.72 sebagai hutang yang kena dibayar kepada pemiutang penghakiman daripada satu fasiliti perbankan yang diberikan kepada syarikat yang mana penghutang penghakiman ialah penjaminnya. KPJI kemudiannya memohon di bawah s 42 Jadual C k 27 Akta Kebankrapan 1967 ('Akta') kepada penolong kanan pendaftar ('PKP') untuk mengurangkan jumlah yang dibuktikan daripada RM41,448,354.72 kepada RM260,000. KPJI dalam membuat permohonan tersebut bergantung kepada dua pucuk surat yang ditulis oleh peguam cara pemiutang penghakiman yang secara jelasnya menunjukkan bahawa mereka bersedia untuk menerima bukti hutang RM260,000 sebagai ganti RM41,448,354.72. Pada masa bukti hutang bagi jumlah RM41,448,354.72 oleh KPJI dikeluarkan, KPJI tidak mempunyai bukti untuk menunjukkan bahawa satu jumlah yang lain telah dipersetujui antara pemiutang penghakiman dan penghutang penghakiman. Pemiutang penghakiman memfailkan rayuan ini terhadap keputusan PKP dalam membenarkan permohonan KPJI untuk mengurangkan jumlah dalam bukti hutang. Isu-isu yang timbul adalah: (a) sama ada seorang bankrap boleh bertindak dengan sendirinya untuk berunding dengan pemiutangnya memandangkan seorang bankrap tidak mempunyai status yang sah; dan (b) sama ada surat-menyurat antara penghutang penghakiman dengan pemiutang penghakiman merupakan kontrak yang dimeterai yang mengikat pihak-pihak untuk mengurangkan hutang yang pada mulanya berjumlah RM41,448,354.72 kepada hanya RM260,000.

Diputuskan, menolak rayuan dengan kos:

(1) Seorang bankrap adalah kompeten untuk berunding sebarang

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penyelesaian hutangnya dengan pemiutangnya dengan syarat bahawa sebarang perjanjian yang dipersetujui menurut rundingan tersebut dibawa kepada perhatian KPJI bagi mendapatkan kebenarannya, agar perjanjian tersebut sah sepenuhnya (lihat perenggan 10).

(2) Sememangnya termasuk dalam hak KPJI untuk bertindak di bawah s 42 Jadual C k 27 Akta untuk memohon kepada mahkamah untuk mengurangkan jumlah hutang yang telah dibuktikan telah dibenarkannya sebelumnya. Apa yang dipohon oleh KPJI adalah 'to expunge or reduce' jumlah yang telah dibenarkan sebelumnya sekiranya KPJI berfikiran bahawa bukti tersebut telah diterima secara salah (lihat perenggan 11–12).

(3) Surat bertarikh 29 Julai 2004 daripada peguam cara kepada pemiutang penghakiman secara jelas menunjukkan bahawa pemiutang penghakiman bersedia untuk menerima hutang yang telah dikurangkan tersebut. Surat tersebut menunjukkan perjanjian yang termeterai antara pemiutang penghakiman dengan si bankrap hanya tertakluk kepada kebenaran daripada KPJI sahaja (lihat perenggan 14–15).]

Notes

For cases on sanction of Director General of Insolvency generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2272–3021.

For cases on undischarged bankrupt, capacity of bankrupt generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2330–2354.

Cases referred to

Kerpa Singh v Bariam Singh [1966] 1 MLJ 38, FC (refd)

Kwong Yik Bank Bhd v Hah Chiew Yin Yin [1985] 2 MLJ 452, FC (refd)

The Ka Wah Bank Ltd v Nadinusa Sdn Bhd & Anor [1998] 2 MLJ 350, FC (refd)

Ting Nguk Yong v Bank Utama (Malaysia) Bhd [1999] 1 CLJ 173, HC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 18, 26, 38(1)(a), 42, 72, 73, 73(1)(e), Schedule C s 42 rr 26, 27

Contracts Act 1950 s 7

Janet Chai (Chooi & Co) for the judgment debtor.
Prem Ramachandran (Kumar Partnership) for the judgment creditor.
Nurhafiza (Rozaida with her) (Department of Insolvency) for the Director General of Insolvency.

Kang Hwee Gee J (delivering oral judgment):

[1] This is an appeal by the judgment creditor against the decision of the

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senior assistant registrar in allowing an application made by the Director General of Insolvency to reduce the amount in the proof of debt which the Director General had approved earlier. The application is made under s 42 Schedule C r 27 of the Bankruptcy Act 1967 which read as follows:

> If the Official Assignee thinks that a proof has been improperly admitted the court may on his application, after notice to the creditor who made the proof, expunge the proof or reduce its amount.

[2] Originally the Director General of Insolvency had approved a large sum of RM41,448,354.72 as a debt due and owing to the judgment creditor arising from a banking facility granted to a company of which the judgment debtor had stood as guarantor.

[3] The present application before the senior assistant registrar is to reduce the amount proved from RM41,448,354.72 to RM260,000.

[4] The Director General of Insolvency in making the application had relied on two letters which they had obtained from the judgment debtor. The two letters read as follows:

(1) Letter dated 29 July 2004 from the judgment creditor's solicitors to the judgment debtor/bankrupt:

> We refer to your letter dated 26 July 2004 to Mr Chooi Mun Sou, which we have referred to our client for instructions. Our client has instructed us to inform you that it is not agreeable to your proposal in your letter of 26 July 2004. Inter alia, our client would require the following before our client will consider a settlement:
>
> (1) Any settlement has to be made through the Director General of Insolvency (DGI);
>
> (2) All costs of the DGI and all our client's solicitors costs in acting on their behalf in any settlement has to be settled by you on a full indemnity basis.
>
> (3) The minimum sum our client will consider receiving as settlement is RM250,000.00. Any settlement sum must be received in one lump sum by our client and not by instalments.
>
> Kindly therefore forward us, within 7 days of the date hereof, a full and complete proposal for settlement which would be acceptable to the DGI and our client for our client's consideration.
>
> We look forward to hearing from you.

(2) Letter dated 3 September 2004 from the judgment creditor's solicitors to the judgment debtor/bankrupt:

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We refer to your letters dated 16 August 2004 and 2 September 2004. Please note that our legal costs will be RM10,000 excluding 5% government service tax as costs in relation to the settlement.

[5] The eight letters as per the affidavit of the judgment creditor read as follows (encl 57):

1st July 2004

Private & Confidential

Hashbudin Hashim

14, Jalan Tempinis Satu

Lucky Gardens

Bangsar

59100 Kuala Lumpur.

Mr. Chooi Mun Sou Messrs. Chooi & Co.

Level 23, Menara Dion

27, Jalan Sultan Ismail

50250 Kuala Lumpur.

Dear Mr. Chooi,

RE: KA WAH BANK LTD. v HASHBUDIN HASHIM

I refer to the above. I appeal to your goodself to kindly consider an offer of RM250,000.00 as being the full and final settlement of the case.

For the last 5 years, I have suffered by losing opportunities in business after the bankruptcy order was made against me. I have not been able to earn due to the bankruptcy order. Further, I suffered humiliation and mental trauma.

I understand that the new finance institution in China had written off the Nadinusa loan of which I was the guarantor. Supreme Finance failed after Supreme Group of Companies failed due to problems faced by a majority shareholder.

I appeal to your goodself to consider this offer as we hope to put behind all these problems and close the file. I apologize for any inconvenience caused.

I am trying to appeal to some associates to help me pay the sum of RM250,000.00. Your kind consideration is highly appreciated.

Yours faithfully,

Sgd.

HASHBUDIN HASHIM

980636 IB

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14 July 2004

STRICTLY WITHOUT PREJUDICE

BY POST

Encik Hashbudin bin Hashim

14, Jalan Tempinis Satu

Lucky Gardens

Bangsar

59100 Kuala Lumpur.

Dear Encik Hashbudin,

KUALA LUMPUR HIGH COURT BANKRUPTCY D3-29-2038-98 RE HASHBUDIN BIN HASHIM EX P CITIC KA WAH BANK LIMITED

We refer to your letter dated 1 July 2004 to Mr. Chooi Mun Sou, which we have referred to our client for instructions. Before our client can consider your offer, our client would like you to provide us with full details of your proposal and the manner in which the proposed settlement is to be effected bearing in mind that you are a bankrupt. Our client would like you to note, without prejudice to its rights and position, that our cient will expect that any settlement will provide for payment by you of all our client's solicitors costs and the costs and fees of the Director General of Insolvency.

We look forward to hearing from you.

Yours faithfully,

for CHOOI & COMPANY

Sgd

IRA BISWAS

Tel.: 2055 3901

Fax: 2055 3880/3881

cc. Client (By fax & post)

26th July 2004

Private & Confidential

Hashbudin Hashim

14, Jalan Tempinis Satu

Lucky Gardens

Bangsar

59100 Kuala Lumpur.

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Messrs. Chooi & Co.

27, Jalan Sultan Ismail

50250 Kuala Lumpur.

Attn: Ms Ira Biswas

Dear Mr. Chooi,

RE: KA WAH BANK LTD. v HASHBUDIN HASHIM

I refer to the above matter and to your letter dated 14.7.2004.

My friend, Dato' Yap Kim San will make five equal installments of RM50,000.00 per month. The RM250,000.00 payment is inclusive of your costs as per my letter dated 1.7.2004. The fees to the Director General of Insolvency will be negotiated and settled by another friend.

I appeal to your goodself to kindly consider this offer to fully settle the outstanding and close the file.

Your kind consideration is highly appreciated.

Yours faithfully,

Sgd.

HASHBUDIN HASHIM

c.c. Dato' Yap Kim San

980636 IB

29 July 2004

STRICTLY WITHOUT PREJUDICE

BY POST

Encik Hashbudin bin Hashim

14, Jalan Tempinis Satu

Lucky Gardens

Bangsar

59100 Kuala Lumpur.

Dear Encik Hashbudin,

KUALA LUMPUR HIGH COURT BANKRUPTCY D3-29-2038-98 RE HASHBUDIN BIN HASHIM EX P CITIC KA WAH BANK LIMITED

We refer to your letter dated 26 July 2004 to Mr. Chooi Mun Sou, which we have referred to our client for instructions. Our client has instructed us to inform you that it is not agreeable to your proposal in your letter of 26 July 2004.

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Inter alia, our client would require the following before our client will consider a settlement:-

1. Any settlement has to be made through the Director General of Insolvency (DGI);
2. All costs of the DGI and all our client's solicitors costs in acting on their behalf in any settlement has to be settled by you on a full indemnity basis.
3. The minimum sum our client will consider receiving as settlement is RM250,000.00. Any settlement sum must be received in one lump sum by our client and not by instalments.

Kindly therefore forward us, within 7 days of the date hereof, a full and complete proposal for settlement which would be acceptable to the DGI and our client for our client's consideration.

We look forward to hearing from you.

Yours faithfully,

for CHOOI & COMPANY

Sgd

IRA BISWAS

Tel.: 2055 3901

Fax: 2055 3880/3881

cc. Client (By fax & post)

5th August 2004

Private & Confidential

Hashbudin Hashim

14, Jalan Tempinis Satu

Lucky Gardens

Bangsar

59100 Kuala Lumpur.

Messrs. Chooi & Co. Advocates & Solicitors

Level 23, Menara Dion

27, Jalan Sultan Ismail

50250 Kuala Lumpur.

Attn: Mr. Chooi

Dear Mr. Chooi,

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RE: KA WAH BANK LTD. v HASHBUDIN HASHIM

I refer to the above matter and to your letter dated 29.7.2004.

Dato' Yap Kim San will pay RM250,000.00 in one lump sum within thirty (30) days from the date above. The payment will be made to the Director General of Insolvency as required by you.

All costs of the DGI and your solicitors' costs in acting for your client will be settled and fully indemnified.

I hope that you would kindly consider accepting this proposal as being full and complete settlement.

Thank you for your kind consideration and patience.

Yours faithfully,

Sgd.

HASHBUDIN HASHIM

c.c. Dato' Yap Kim San

980636 IB

10 August 2004

STRICTLY WITHOUT PREJUDICE

BY POST

Encik Hashbudin bin Hashim

14, Jalan Tempinis Satu

Lucky Gardens

Bangsar

59100 Kuala Lumpur.

Dear Encik Hashbudin,

KUALA LUMPUR HIGH COURT BANKRUPTCY D3-29-2038-98 RE HASHBUDIN BIN HASHIM EX P CITIC KA WAH BANK LIMITED

We refer to your letter dated 5 August 2004. On a strictly without prejudice basis, our client has asked us to inquire whether you have put forward your proposal to the Director General of Insolvency (DGI) and whether the same is acceptable to the DGI to be put forth to all your creditors including our client for their acceptance. As stated in our letter of 29 July 2004, please note that our client will expect that our client will receive a minimum sum of RM250,000.00 and that all our client's solicitors costs and costs of the DGI will be paid in full before our client will consider any settlement proposal from the DGI.

Kindly let us hear from you on the above together with the proposal from the DGI for our client's consideration.

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Yours faithfully,

for CHOOI & COMPANY

Sgd

IRA BISWAS

Tel.: 2055 3901

Fax: 2055 3880/3881

cc. Client (By fax & post)

2nd September 2004

Private & Confidential

Hashbudin Hashim

14, Jalan Tempinis Satu

Lucky Gardens

Bangsar

59100 Kuala Lumpur.

Messrs. Chooi & Co. Advocates & Solicitors

Level 23, Menara Dion

27, Jalan Sultan Ismail

50250 Kuala Lumpur.

Attn: Mr. Chooi

Dear Mr. Chooi,

RE: KA WAH BANK LTD. v HASHBUDIN HASHIM

With reference to the above matter and to my letter dated 16.8.2004, I would be grateful if you could revert with your solicitor's costs for the settlement on an urgent basis to facilitate my discussions with the DGI.

Your assistance in this matter is appreciated.

Yours faithfully,

Sgd.

HASHBUDIN HASHIM

c.c. Dato' Yap Kim San

980636 IB

3 September 2004

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STRICTLY WITHOUT PREJUDICE

BY POST

Encik Hashbudin bin Hashim

14, Jalan Tempinis Satu

Lucky Gardens

Bangsar

59100 Kuala Lumpur.

Dear Encik Hashbudin,

KUALA LUMPUR HIGH COURT BANKRUPTCY D3-29-2038-98 RE HASHBUDIN BIN HASHIM EX P CITIC KA WAH BANK LIMITED

We refer to your letters dated 16 August 2004 and 2 September 2004. Please note that our legal costs will be RM10,000.00 excluding 5% government service tax as costs in relation to the settlement.

Yours faithfully,

for CHOOI & COMPANY

Sgd

IRA BISWAS

Tel.: 2055 3901

Fax: 2055 3880/3881

cc. Client (By fax & post)

[6] Miss Janet Chai for the judgment creditor:

(1) It is pertinent to note that at the time of proof of debt for the sum of RM41,448,354.72 by the Director General of Insolvency was issued, the Director General of Insolvency had no evidence to show that a different sum has been agreed between the judgment creditor and the judgment debtor. This proof of debt was issued on 14 June 2007. The Director General of Insolvency did not know of the now alleged settlement between the judgment creditor and the judgment debtor before the letters were submitted to them. This raises a question of law whether a bankrupt can act on his own to negotiate with his creditors given that a bankrupt has no legal status. See *Ting Nguk Yong v Bank Utama (Malaysia) Bhd* [1999] 1 CLJ 173 per Muhammad Kamil Awang J at p 174, Held (2):

> The OA is the trustee of the estate of the bankrupt; it is incumbent that all dealings with the estate be made through him. Once receiving and adjudication orders are made, the bankrupt's estate vests with the OA and,

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under s 38(l)(a) of the Act, the OA must be consulted in any action intended by the bankrupt which may be detrimental to his creditors. No one has the right to interfere or intermeddle in the estate of the bankrupt without the prior sanction or consent of the OA. Any dealings in the estate of the bankrupt may validly be made through and/or by joining the OA as a party. Whatever private arrangement or act without reference to the OA is not binding on the estate and stands invalid.

(2) The application by the Director General of Insolvency has contravened ss 18 and 26 of the Bankruptcy Act 1967. Under s 18 the Director General of Insolvency is required to call for a meeting of all the creditors of the bankrupt to determine or to entertain a proposal for a composition or scheme of arrangement in relation to the debts due to the creditors from the debtor. The composition of scheme will only be binding on the creditors when a resolution passed by at least three fourths in value of all the creditors who had proved and when such scheme or composition is approved by the court.

(3) The status of a bankrupt — 'Legally, when an adjudication order is made against the bankrupt, he ceases to enjoy the full capacity of a normal person. In the normal scheme of things, the State has by statute created an institution, the official assignee, upon whom is entrusted the duty to administer the bankruptcy laws, and to look after the affairs of the estate of the bankrupt. No one has the right to interfere or intermeddle in the estate of the bankrupt without the prior sanction or consent of the official assignee. In other words, any dealings in relation to the estate may validly be made through and/or by joining the official assignee as a party. Whatever private arrangement or act without reference to the official assignee is not binding on the estate, and stands invalid.' per Justice Muhammad Kamil Awang in *Ting Nguk Yong v Bank Utama (Malaysia) Bhd* [1999] 1 CLJ 173 at p 177. In our case it is pertinent to note that the Director General of Insolvency has stated on oath in his affidavit in support of his application to reduce the amount under s 42 that at the time the proof of debt was issued there was no evidence to support and/or show that a different amount has been agreed between the bankrupt and the judgment creditor apart from the amount claimed dated 2 October 2000 for a sum of RM41,448,354.72 which was filed by the judgment creditor. It was only thereafter the Director General of Insolvency has received a copy of the 'Settlement Letter' dated 29 July 2004 that the settlement sum has been agreed at RM250,000. The bankrupt has gone on a frolic of his own to negotiate a settlement without the prior sanction of the official assignee and therefore such acts of attempted settlement

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A are invalid. Further, the official assignee has through the current application before the court seeks to say that it had sanctioned or ratified or consented to the actions of the bankrupt in attempting to settle his debts. This is clearly not permitted under ss 18 and 26 of the Bankruptcy Act 1967.

B (4) In any case there is no acceptance of the proposal made by the bankrupt. In all the letters put forth by the judgment creditor's solicitors it is clearly stated that the judgment creditor is not agreeable to the bankrupt's proposal. It has also within the letters stated a few matters that are required to be done before considering a settlement. The letters that the Director General of Insolvency seeks to rely on clearly show that the judgment creditor was not agreeable to the bankrupt's proposal. The second letter relied on by the Director General of Insolvency is merely one letter out of the entire series of correspondence that talks about estimated legal cost in relation to the settlement. The letter that the bankrupt seeks to rely on to say that there is a concluded contract as is clear from the following paragraph of the bankrupt's letter dated 5 August 2004: 'I hope that you would kindly consider accepting this proposal as being full and complete settlement.' That there is no concluded contract is clear from the bank's reply to this letter, the relevant paragraph of which read: 'Kindly let us hear from you on the above together with the proposal from the DGI for our client's consideration.' Thereafter the last two letters between the bankrupt and the judgment creditor relates to only an estimate of the solicitors' costs which was to be paid from the bankrupt's estate for the bankrupt to facilitate the bankrupt's discussions with the Director General of Insolvency. Thereafter there was no proposal from the Director General of Insolvency. On 14 June 2007 the Director General of Insolvency only approved a proof of debt of the sum of RM41,448,354.72 thereby confirming its decision to accept the sum claimed as per the judgment sum. Only subsequently after a lapse of 20 days the Director General of Insolvency issued another proof of debt of the sum of RM260,000.

H (5) The law is clear on offer and acceptance. See *The Ka Wah Bank Ltd v Nadinusa Sdn Bhd & Anor* [1998] 2 MLJ 350 approving *Chitty on Contracts* per Mohamed Dzaiddin FCJ at Held (3):

I > The learned judge did not give reasons for his conclusion that P11 contained a definite offer to settle the second and third suits. His Lordship misdirected himself in relying on the oral evidence of John Gomez, who stated that P11 was a letter of offer. Whether or not P11 constituted a definite offer was a question of construction. Reading P11 together with the correspondence pleaded in the statement of

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claim, it was not a letter of offer. P11 was written by John Gomez to the bank for the purpose of confirming an earlier telephone conversation between him and the bank concerning the bank's desire to settle the two suits on the terms mentioned therein and for John Gomez to mention this to Hashbudin' s solicitors. P11 was merely a preliminary communication between John Gomez & Associates and the bank, confirming the earlier discussion between John Gomez & Associates and the bank. Therefore, the learned judge's finding that P11 was a definite letter of offer could not be agreed with.

Furthermore, P15 could not in law constitute an acceptance. An acceptance is a final and unqualified expression of assent to the terms of the offer. But, where the reply is qualified or attempts to vary the terms of the offer or attempts to accept an offer on new terms (not contained in the offer), then such a reply is not a communication of an acceptance but may be a rejection accompanied by a counter offer which the original offeror can accept or reject. In the light of the conditions put forward by Sri Ram & Co in P15 that the bank gave an undertaking to withdraw the two suits and that each party was to pay their own costs, which terms were not in P11, P15 therefore did not constitute a final acceptance of the bank' s terms of the offer, but an attempt by the offeree to vary the original offer in P11 to include new terms on undertaking and costs. In the circumstances, there was no concluded contract. The learned judge had erred in law on his finding that from the evidence and the exhibits, the parties had come to a definite and complete agreement in respect of the settlement of the second and third suits (see pp 369C–H and 370E–H).

[7] Puan Rozaida for the Director General of Insolvency:

(1) The Director General of Insolvency in approving the proof of debt in respect of the judgment creditor in this case relied on two letters written by the solicitor of the judgment creditor which clearly indicated in no uncertain terms that they were prepared to accept the proof of debt of RM260,000 in lieu of the sum of RM41,448,354.72.

(2) The only issue remaining is whether the bankrupt can act on his own to negotiate a settlement with the judgment creditor and later obtain approval from the Director General of Insolvency to accept the settlement in the name of the Director General of Insolvency. See *Kerpa Singh v Bariam Singh* [1966] 1 MLJ 38 — bankrupt negotiated settlement on his own debt held competent. See also *Kwong Yik Bank Bhd v Hah Chiew Yin Yin* [1985] 2 MLJ 452 — bankrupt's brother settled debt of RM30,000 by paying RM16,000. Valid contract although not negotiated through official assignee. The book *Law and Practice of Bankruptcy in Singapore and Malaysia*, p 230 says 'the act of

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bankruptcy in itself does not deprive the bankrupt of his general ability to contract' based on the scope of the Act which did not appear to have placed any such restriction.

(3) The law is silent. All that it provides under s 38(1)(a) is to provide that 'the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency'. This provision does not preclude the bankrupt from negotiating with any creditors without entering into any agreement, as the bankrupt had done in this case. All that the bankrupt had done was to enter into a discussion or proposal for settlement. The Director General of Insolvency is under a duty to manage and to distribute the assets of the bankrupt to the creditors. Even though the bankrupt initiated the settlement but it was the Director General of Insolvency who decided whether or not to accept the settlement.

(4) Further the judgment creditor itself had made in the letter dated 29 July 2004 the pre-condition that the settlement can only be operative if it is sanctioned by the Director General of Insolvency.

(5) When the Director General of Insolvency first admitted the proof of debt at RM41,448,354.72 he is exercising his duty under s 42 r 26 of Schedule C. Consequently we sent a notice to the judgment creditor accepting the debt as RM41,448,354.72 vide our letter dated 14 June 2007. Subsequently however when we discovered that there was an arrangement to reduce the debt in the form of the two letters we made an application to reduce the debt already proved to the lesser amount pursuant to s 42 r 27 of Schedule C of the Bankruptcy Act 1967 which read as follows:

> If the Director General of Insolvency thinks that a proof has been improperly admitted the court may on his application, after notice to the creditor who made the proof, expunge the proof or reduce its amount.

(6) In this case the Director General of Insolvency did not proceed under s 26 of the Act to call for a composition of debt with the creditors as the bankrupt in this case would have enough money to pay all creditors including the judgment creditor if the sum claimed RM41,448,354.72 had been reduced to a mere RM260,000. We only discovered the two letters when the bankrupt forwarded a copy of each letter to us after we issued the first proof of debt.

(7) The letter from the judgment creditor dated 3 September 2004 alluding to the fact that their legal costs would be RM10,000 constitutes the judgment creditor's agreement to the settlement.

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[8] Reply by Miss Janet Chai:

(1) Not stated in *Kerpa Singh* case that bankrupt can negotiate with creditors. With regards to *Kwong Yik Bank*, it is also not an issue.

(2) Bankruptcy Act 1967 ss 72 and 73 set out the duties of the Director General of Insolvency. There is no provision that the Director General of Insolvency can compromise a debt with creditors. Section 73(1)(e) compels the Director General of Insolvency to report to the creditors as to any proposal which the debtor makes with respect to the loan of liquidating his affairs. Sections 18 and 26 set out the steps that should be taken when there is a proposal for a composition which means settlement in satisfaction of the debt. No power to compromise a debt. This procedure had not been followed.

(3) Section 7 of the Contracts Act 1950 on acceptance of the contract.

Submit: No acceptance of the proposal by the bankrupt. They have clearly stipulated that they will only consider a proposal on settlement if it comes from the Director General of Insolvency.

FINDINGS AND DECISION

[9] Whether or not the present application of the Director General of Insolvency should be allowed would depend on:

(a) whether the bankrupt himself could after the AO and RO had been pronounced negotiate with the judgment creditor the reduction of his debt subject to be approved later by the Director General of Insolvency;

(b) whether the correspondences entered into between the judgment debtor and the judgment creditor constitute a concluded contract which binds the parties to reduce the initial debt of RM41,448,354.72 to a mere RM260,000.

[10] A bankrupt is competent to negotiate any settlement of his debt with his creditor and provided that any agreement that is reached pursuant to that negotiation is brought to the attention of the official assignee (now called Director General of Insolvency) for his approval, such an agreement is perfectly valid.

[11] It is perfectly within the right of the Director General of Insolvency acting under s 42 Schedule C r 27 of the Bankruptcy Act 1967 to apply to the court to reduce the amount in the proof of debt which he had approved earlier. The provision reads as follows:

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A If the Director General of Insolvency thinks that a proof has been improperly admitted the court may on his application, after notice to the creditor who made the proof, expunge the proof or reduce its amount.

B **[12]** It is pertinent to note right from the start that what the Director General of Insolvency is now applying for is 'to expunge or reduce' the amount that he had previously admitted if the Director General of Insolvency 'thinks that a proof has been improperly admitted'. This is quite different from exercising his duty and power under ss 18, 26, 72 and 73 of the C Bankruptcy Act 1967 as submitted by counsel for the judgment creditor.

[13] It is clear that the Director General of Insolvency had upon being informed of the existence of a settlement of the original debt of RM41,448,354.72 for the much reduced sum of RM260,000 acted under D s 42 of the Bankruptcy Act 1967 to reduce the amount of RM41,448,354.72 as debt due to the judgment creditor that he had previously admitted. The affidavit of the Director General of Insolvency in support of this application clearly indicates this.

E **[14]** The letter dated 29 July 2004 from the solicitors for the judgment creditor Messrs Chooi & Co to the judgment debtor clearly indicates that the judgment creditor was prepared to accept the reduced debt subject only to the following three conditions:

F

(1) any settlement has to be made through the Director General of Insolvency (DGI);

(2) all costs of the DGI and all our client's solicitors costs in acting on their behalf in any settlement has to be settled by you on a full indemnity G basis.

(3) the minimum sum our client will consider receiving as settlement is RM250,000. Any settlement sum must be received in one lump sum by our client and not by instalments.

H

[15] The letter constitutes a perfectly concluded agreement between the judgment creditor and the bankrupt subject only to the approval of the Director General of Insolvency.

I

[16] The senior assistant registrar was right in allowing the Director General of Insolvency's application to reduce the amount in the proof of debt which the Director General of Insolvency had previously approved from the sum of RM41,448,354.72 to RM260,000.

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[17] The appeal of the judgment creditor is dismissed with costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum